IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 10-0084

BRADLEY HOWARD/HOWARD FAMILY 1995 TRUST,

Appellant and Third Party Respondent,

v.

SHELLY WEIDOW,

Appellee and Petitioner,

v.

UNINSURED EMPLOYERS' FUND,

Appellee and Respondent/Third-Party Petitioner.

OBJECTION TO CORRECTED NOTICE OF APPEAL

On Appeal from the Montana Workers' Compensation Court,
the Honorable James Jeremiah Shea
Cause no. WCC No. 2007-1863

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INTRODUCTION

Weidow believes this Court should remand this matter to the Workers' Compensation Court (WCC) so it can set a scheduling order to resolve Claimant's rights to benefits under the Workers' Compensation Act. Weidow does not believe the *Findings of Fact, Conclusions of Law and Judgment* issued by the WCC on January 22, 2010 is not presently appealable under M.R.App.P.. Rule 6 or M.R.Civ.P., Rule 54(b).

Therefore, in order to expeditiously dispose of all claims and create appellate jurisdiction, Weidow requests the opportunity to present his case to the WCC on his entitlement to indemnity benefits and vocational rehabilitation benefits under the Act.

PROCEDURE

The Montana Supreme Court issued an Order dated March 9, 2010, stating it is "unclear to us whether the Workers' Compensation Court has entered a final order disposing of all claims as to all parties, in which case certification under M.R.App.P. 54(b) is not necessary" or whether an appeal prior to final judgment is appropriate under Montana case law and properly taken under M.R.Civ.P. 54(b).

On March 15, 2010, the Appellant, Bradley Howard/Howard Family 1995 Trust, filed a Corrected Notice of Appeal. In this notice, Howard asserts that this is not a M.R.Civ. P., Rule 54(b) appeal. Therefore, the only option is a M.R.App.P., Rule 6 appeal. Neither of these rules apply here.

ARGUMENT

Having reviewed the requirements for an appeal under either M.R.App.P., Rule 6 and M.R.Civ.P., Rule 54(b), Claimant does not believe an appeal is appropriate at the present time and the rest of Claimant's case should be presented to the WCC and ruled upon.

"In general, parties may only appeal a district court's final judgment. M.R.App.P. 1.[1] Rule 54(b), of the Montana Rules of Civil Procedure (Rule 54(b)), however, expressly allows a district court to certify an order as final for purposes of appeal prior to final judgment. Appeals from the WCC proceed in the same manner as appeals from a district court. Admin.R.M. 24.5.348. The administrative rules governing the WCC's procedure also include a 'final certification for the purposes of appeal.' Admin. R.M. 24.5.348(2). The 'final certification' under Admin.R.M. 24.5.348(2) differs from Rule 54(b), however, in that it functions as a notice of entry of judgment, rather than as a method to authorize interlocutory appeals." *Satterlee v. Lumberman's Mut. Ins. Co.*, 2007 MT 325, ¶ 12, 340 Mont. 176, 178 P.3d 689.

As only the issue of casual employment was tried to the Court, there is no final judgment as to all issues raised in this appeal. It was Claimant's understanding that he could prevail on the issue of whether Bradley Howard/Howard Family 1995 Trust was required to carry workers' compensation coverage, then obtain appropriate medical treatment through the UEF to evaluate his right to further indemnity benefits under the Act. See *Findings of Fact, Conclusions of Law and Judgment*. ¶89-90.

However, post-judgment actions in this case show that neither the UEF nor Bradley Howard/Howard Family 1995 Trust intend to allow Claimant to medically treat for his injuries and allow him to progress with medical aid to maximum medical improvement ("MMI"). Instead, Bradley Howard/Howard Family 1995 Trust seeks to appeal the WCC's finding that no casual employment or independent contractor relationship existed. This will almost certainly

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[1] At the time this Court decided *Satterlee*, the pre-Oct. 2007 Rules of Appellate Procedure were in place and M.R.App.P. 1 set forth the orders appealable in civil cases. Under the current appellate rules it is M.R.App.P. 6.

lead to piecemeal appeals of the sort disallowed by the Court. Putative Appellant Howard also cannot demonstrate this is the "infrequent harsh case" that warrants a M.R.Civ.P. 54(b) appeal. Therefore, under the guidance set forth by the Montana Supreme Court in its Rule 54(b) jurisprudence, this Court should reject the appeal and order the WCC to set a scheduling order to dispose of the remaining issues in this matter.

Although Appellant Howard has recognized that a M.R.Civ.P., Rule 54(b) appeal is not appropriate, Weidow will address this issue in the event this Court considers it. There are five factors and three "guiding principals" for Courts to consider in granting a certification under M.R.Civ.P. 54(b):

FACTORS

(1) The relationship between the adjudicated and unadjudicated claims;
(2) the possibility that the need for review might or might not be mooted by future developments in the district court;
(3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
(4) the presence or absence of a claim or counterclaim which could result in a setoff against the judgment sought to be made final.
(5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense and the like.

GUIDING PRINCIPALS

(1) the burden is on the party seeking final certification to convince the district court that the case is the 'infrequent harsh case' meriting a favorable exercise of discretion;
(2) the district court must balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final;
(3) the district court must marshall [sic] and articulate the factors upon which it relied in granting certification so that prompt and effective review can be facilitated.

Roy v. Neibauer, 188 Mont. 81, 610 P.2d 1185 (1980); *Satterlee* at ¶16.

This case fails to warrant 54(b) certification based on the guiding principals. First, this case is unlikely to be regarded as the "infrequent harsh case" to anyone other than Shelly Weidow. The WCC has determined that Howard was an uninsured employer. This Court recently held that the failure to purchase workers compensation coverage "should be a financially painful experience." *State Farm Fire & Cas. Co. v. Bush Hog, LLC*, 2009 MT 349, ¶24, 353 Mont. 173, 219 P.3d 1249.

To date, Howard has not paid out indemnity or medical benefits due under the WCA. Howard has even requested the WCC not require him to post any sort of appellate bond. This is not a "harsh case" for Howard.

By contrast, Shelly Weidow's injuries have had a significant impact on him. Because the facts to support this contention are not in the record, Weidow will not detail them here. Nonetheless, Weidow does not seek immediate appellate review: he seeks the opportunity guaranteed him under the WCA to treat for his injuries. The burden for an immediate appeal is on Howard and he cannot demonstrate this to be the "infrequent harsh case."

Next, Courts must "balance the competing factors present in the case to determine if it is in the interest of sound judicial administration and public policy to certify the judgment as final." While some of the matters discussed in the preceding paragraph play into that determination, the public policy of Montana disfavors a certification of this matter as final. The public policy of Montana can be found in statutory and constitutional law. *St. Louis Mining & Milling Co. v. Montana Mining Co.*, 171 U.S. 650, 655 (1898); *First Bank, N.A.–Billings v. TransAmerica Ins. Co.*, 209 Mont. 93, 679 P.2d 1217 (1984). The Montana State Constitution guarantees speedy remedy and the administration of justice "without sale, denial, or delay." Art. II, Sec. 16. "The objective of the WCA is to provide no-fault, wage-loss benefits to the worker who suffers work

related injuries." *Brush Hogg* at ¶23. Montana public policy as expressed in the "declaration of public policy" portion of the WCA is to "return a worker to work as soon as possible after the worker has suffered a work-related injury or disease." Mont. Code Ann. § 39-71-105(3).

These public policy considerations are not served by setting this case up for two separate appeals to the Montana Supreme Court. The post-trial conduct of the UEF and Howard show they have no intention of providing Claimant medical benefits or wage loss benefits so that the extent of his injuries can be determined. It has not been more than three and a half years since his industrial injury. He has not been allowed to "return to work as soon as possible." Likewise, the exact result the WCA seeks to avoid has been imposed on Claimant:" "A worker's removal from the workforce because of a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public." *Id.* As this Court considers the public policy implications in this case, it should find that final certification is inappropriate here and instead remand it to the WCC so it can set a scheduling order to allow Claimant to present the specifics of his entitlements under the Act. Once those entitlements are established by the WCC, a final appeal on those issues may be taken to the Supreme Court. To hold otherwise would cause additional delay in this matter, to the detriment of the Claimant who has won his case.

Finally, many of the reasons discussed in this brief also play into the fifth factor identified in *Roy*: "miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, triviality of competing claims, expense and the like."

Once final judgment is issued by the WCC ruling on Claimant's present entitlements, a final judgment may be entered and the entire case taken up on appeal. Claimant therefore

respectfully requests this Court decline to accept this case under M.R.Civ.P. 54(b) and instead remand it to the WCC.

DATED this 29th day of March, 2010.

DIX, HUNT & MCDONALD

By: _____
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Attorneys for Claimant

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2010, the foregoing *Objection to Corrected Notice of Appeal Order* was mailed, postage prepaid, to the following:

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